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By E-mail and Regular Mail
Karen Geraghty
Administrative Director
Maine Public Utilities Commission
242 State Street
State House Station 18
Augusta, ME 04333-0018

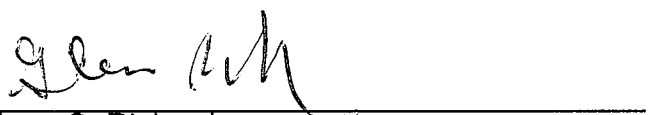
RE: Docket 2008-421 – Comments of the Voice on the Net Coalition

THIS IS A VIRTUAL DUPLICATE OF THE ORIGINAL HARD COPY SUBMITTED TO THE COMMISSION IN ACCORDANCE WITH ITS ELECTRONIC FILING INSTRUCTIONS

Dear Ms. Geraghty:

Enclosed please find an original and one copy of the above captioned pleading in Docket 2008-421. Thank you for your consideration.

The VON Coalition



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Parties in Docket 2008-421 (by e-mail)

BEFORE THE MAINE PUBLIC UTILITIES COMMISSION

PUBLIC UTILITIES COMMISSION DOCKET 2008-421

Investigation into Whether Providers of
Time Warner "Digital Phone" Service and
Comcast "Digital Voice" Service Must Obtain
Certificate of Public Convenience and
Necessity to Offer Telephone Service.

COMMENTS OF THE VOICE ON THE NET COALITION

The Voice on the Net or VON Coalition[1] ("VON") hereby submits these comments responding to the Examiner's Report ("Report") issued May 18, 2010 in the above-referenced docket.[2] The Examiner's Report found that fixed, interconnected Voice over Internet Protocol (VoIP) services provided by two cable companies constitute telephone services under Maine law and are subject to regulation by the Maine Public Utilities Commission ("Commission"). The VON Coalition recommends that the Commission either not adopt the Hearing Examiner's report because it is inconsistent with federal law finding that VoIP is an information service and state regulation has been preempted, or, in the alternative, defer issuing a decision in this matter until the Federal Communications Commission ("FCC") resolves pending proceedings that will clarify the regulatory classification of VoIP.

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[1] The Voice on the Net or VON Coalition consists of leading VoIP companies, on the cutting edge of developing and delivering voice innovations over Internet. The coalition works to advance regulatory policies that enable Americans to take advantage of the full promise and potential of IP-enabled communications. VON believes that with the right public policies, IP-enabled communications can increase broadband adoption, make talking more affordable, businesses more productive, jobs more plentiful, the Internet more valuable, and Americans more safe and secure. VON Coalition members include AT&T, Broadvox, Cisco, Google, iBasis, Microsoft, New Global Telecom, Skype, T-Mobile, Vonage and Yahoo.

[2] The Examiner's Report instructed parties to file responses or exception by June 8, 2010. The VON Coalition filed its Petition to Intervene in this docket on May 27, 2010. The petition was granted on June 4, 2010.

I. INTERCONNECTED VOIP IS AN INFORMATION SERVICE EXEMPT FROM STATE REGULATION

The VON Coalition believes that the threshold question is whether the Commission has any jurisdiction whatsoever to regulate interconnected VoIP. We believe that answer is no.[3]

All interconnected VoIP services – whether fixed or nomadic – provide multiple capabilities that combine information services and voice-calling, which render such services as single "integrated offerings." VoIP users can "utilize multiple service features that access different websites or IP addresses during the same communication session and perform different types of communications simultaneously."[4] These features and functions are inseparable from the voice application that may appear to be most similar to a telephone service.

Accordingly, interconnected VoIP is either unregulated or properly classified as information services under the Telecommunications Act of 1996 ("1996 Act"). The 1996 Act creates a distinction between "telecommunications services" and "information services." The first consists of pure transmission services offered to end users without change in form or content, and subject to common-carrier regulation.[5] The second, in contrast, offers the ability, for example, to store, retrieve, utilize and/or manipulate "information."[6] VoIP service takes full advantage of the flexibility and efficiency of IP-based transmissions by enabling the user to manipulate, generate, store, transform and make information services available to others.[7]

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[3] In this filing, the VON Coalition is only addressing the federal law issues raised by the Report, and it reserves its right to comment on the state-specific analysis in the Report, as appropriate.

[4] *In re Vonage Holdings Corp.*, 19 F.C.C.R. 22404, 22419, ¶ 25 (2004) [hereinafter *FCC Vonage Preemption Order*].

[5] 47 U.S.C. § 153(43).

[6] 47 U.S.C. § 153(20).

[7] The 1996 Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ." *See* 47 U.S.C. § 153(20).

The FCC has further explained that the statutory definitions of telecommunications service and information service do not "rest[] on the particular types of facilities used."[8] Each rests instead "on the function that is made available."[9] IP-enabled services that originate or terminate in IP are intrinsically information services when traffic is exchanged between an IP network and the PSTN because the traffic must, of necessity, undergo a net protocol conversion from circuit-switched format to IP (or vice versa). The FCC has held that "both protocol conversion and protocol processing services are information services under the 1996 Act."[10]

In addition, the FCC has held that a service will be treated as a single, integrated information service, rather than as an information service with a separate telecommunications service component, when the telecommunications features are not "separated from the data-processing capabilities of the service" but are instead "part and parcel of [the overall information] service and . . . integral to its other capabilities."[11] Thus, interconnected VoIP falls squarely within the definition of an "information service" and is subject to exclusive federal jurisdiction unless otherwise specifically provided by Congress or the FCC.

Under federal law, "information services" are exempt from telecommunications regulation, which includes state regulation (including certification and tariff requirements). The FCC's long standing policy of exempting information services from state public utility regulation has proven to be one of the great successes in implementing the 1996 Act's pro-competitive

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[8] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 F.C.C.R. 4798, 4821, ¶ 35. (2002).

[9] *Id.*

[10] First Report and Order and Further Notice of Proposed Rulemaking, 11 F.C.C.R. 21905, 21956, ¶ 104 (1996) ("Non-Accounting Safeguards Order").

[11] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* GN Docket No. 00-185, *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities,* CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, ¶¶ 36, 38.

objectives. The Examiner's Report recognizes that classification of VoIP as an information service would limit the ability of the Commission to regulate the service.[12]

While the FCC has asserted limited jurisdiction over interconnected VoIP services, it has not treated interconnected VoIP as a traditional telecommunications service. Specifically, the FCC has imposed a number of public safety and consumer protection obligations, including, requirements to provide Enhanced 911 services, make the service accessible by law enforcement, contribute to the Federal Universal Service and Telecommunications Relay Service Funds, protect customer proprietary network information and provide customers notice before discontinuing service.[13] In all of these actions, however, the FCC has not granted the states authority to require certification or impose any other specific telecommunications fees or other obligations on interconnected VoIP providers. Certification, as would be required by the Commission if the Examiner's Report is adopted, is not a general obligation applicable to entities conducting business within a state, but instead is targeted at a specific class of entities, and as a result falls within the scope of regulations preempted under the *FCC Vonage Preemption Order.*[14]

The FCC has also decided that certain retail VoIP services are exempt from state public utility regulation.[15] Although the Commission notes that the FCC has not declared that VoIP is

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[12] Report at 29. The Examiner's Report concludes that since the FCC has not definitely classified interconnected VoIP as an information service, the relevant inquiry is whether the FCC has otherwise preempted state regulation of the service. This conclusion, however, ignores the federal court decisions discussed herein, finding that VoIP is an information service.

[13] First Report and Order and Notice of Proposed rulemaking, WC Docket 04-36, FCC 05-116, released June 3, 2005 (imposing E911 requirements); Report and Order and Notice of Proposed Rulemaking, WC Docket 06-122, FCC 06-94, released June 27, 2006 (imposing USF requirements); Report and Order and Further Notice of Proposed Rulemaking, WC Docket 04-36, FCC 07-22, released April 2, 2007 (imposing CPNI requirements); Report and Order, WC Docket 04-36, FCC 09-40, released May 13, 2009 (imposing discontinuance requirements).

[14] *FCC Vonage Preemption Order*, 19 F.C.C.R. at 22405, ¶ 1.

[15] *See Petition for Declaratory Ruling that Pulver.Com's Free World Dialup is Neither Telecommunications nor a Telecommunications Service,* Memorandum Opinion and Order, 19 F.C.C.R. 3307 (2004) (*"Pulver Declaratory Ruling).*

an information service,[16] multiple federal courts have enjoined state commissions from regulating interconnected VoIP services on the grounds that they were information services, exempt from state utility regulation.[17]

A Minnesota federal district court has even held that "[state] regulations that have the *effect* of regulating information services are in conflict with federal law and must be pre-empted.[18] Additionally, a federal district court in Missouri held that existing laws mandate that states classify VoIP services that perform IP to TDM conversions as an information service. The Missouri District Court recognized that IP-PSTN traffic is an information service because it offers the "capability for generating, acquiring, storing transforming, processing, retrieving, utilizing, or making available information via telecommunications."[19] Moreover, IP-PSTN traffic "alters the form and content of the information sent and received because it involves a net protocol conversion from the digitized packets of the IP protocol to the TDM technology used on the PSTN."[20] While the court recognized that the FCC may be willing to revisit the classification and regulatory status of interconnected VoIP at some point, "existing rules and orders establish how VoIP and other IP services should be treated in the interim."[21]

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[16] Report, at 30.

[17] *See, e.g., Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n,* 290 F. Supp. 2d 993, 1002 (D. Minn. 2003) (summarizing federal policy of preempting state attempts to regulate information services); *Southwestern Bell Telephone L.P. v. Missouri Public Service Board,* 461 F. Supp. 2d 1055, 1082-1083 (E.D. Mo. 2006) (classifying services as information services when it transforms or processes "information," even if the content is the same).

[18] *See Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n,* 290 F. Supp. 2d 993, 1002 (D. Minn. 2003).

[19] *See Southwestern Bell Telephone L.P. v. Missouri Public Service Board,* 461 F. Supp. 2d 1055, 1082-1083 (E.D. Mo. 2006) (*citing* 47 U.S.C. ¶ 153(20)).

[20] *Id.*

[21] *Id.*

More recently, and since the close of the briefing period in this docket, a federal court re-affirmed that IP-originated calls are information services and not subject to access charges.[22] In a dispute concerning whether a VoIP provider owed interstate access charges to a competitive local exchange carrier, the court was persuaded by two prior federal court decision that found that "the transmission which include net format conversion from VoIP to TDM are information services exempt from access charges."[23] It is noteworthy that the VoIP traffic at issue either originated or terminated in IP; there was no relevant distinction between fixed or nomadic VoIP.

For all the reasons set out above, the Commission should rule that VoIP is an information service and not subject to state regulation.

II. INTERCONNECTED VOIP IS SUBJECT TO THE FCC'S EXCLUSIVE JURISDICTION UNDER THE *FCC VONAGE PREEMPTION ORDER*.

In the *FCC Vonage Preemption Order*, the FCC held that Vonage's "Digital Voice" service is subject to FCC exclusive jurisdiction and preempted the Minnesota PUC from imposing traditional telecommunications regulations on that service. The same principles that applied in the *FCC Vonage Preemption Order* apply here. The FCC concluded that Vonage's service is "jurisdictionally mixed" meaning that it includes both interstate and intrastate services.[24] The FCC stated that Vonage's service could, in theory, be subject to state regulation, *provided that* the state regulation could coexist with the FCC's pro-competitive deregulatory framework for information services. However, the FCC held that there were no "practical means" to separate the interstate and intrastate components of Vonage's service to "enable[] dual

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[22] PAETEC COMMUNICATIONS, INC. V. COMMPARTNERS, LLC, US District Court for the District of Columbia, CA No. 08-0397 (February 18, 2010). Note that Paetec has filed a Petition for Interlocutory Appeal with the District of Columbia Circuit.

[23] Id. at 6.

[24] *See FCC Vonage Preemption Order*, 19 F.C.C.R. at 22414, ¶ 18 & n. 63.

federal and state regulations to exist."[25] In other words, the state regulations at issue would not be compatible with the FCC's generally deregulatory framework for information services.

The Hearing Examiner's Report relies too narrowly on the 'severability' reasoning of the *FCC Vonage Preemption Order* to a nomadic device's "lack of dependence on geographic end points."[26] Knowing geographic end points was not the only factor in severability. The FCC stated that

> "the provision of tightly integrated communications capabilities greatly complicates the isolation of intrastate communication and counsels against patchwork regulation. Accordingly, to the extent other entities, such as cable companies, provide VoIP services, [the FCC] would preempt state regulation to an extent comparable to what [it has] done in this Order"[27]

The "practical inseverability" of integrated communications "would . . . preclude state regulation to the same extent as [Digital Voice]."[28] And in regard to this "fact-specific issue" of separation, the FCC is owed a "high level of deference."[29] Moreover, as noted earlier, whether VoIP is fixed or nomadic is a business decision, not a technical limitation.

Further, notwithstanding the Report's conclusion to the contrary, the FCC's holding in the *Vonage Preemption Order* that "that permitting . . . regulations would thwart federal law and

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[25] *Id.* at 22418, ¶ 23.

[26] *See* Report, at 22-23 (citing *FCC Vonage Preemption Order*, 19 F.C.C.R. at 22420, ¶ 25).

[27] *FCC Vonage Preemption Order*, 19 F.C.C.R. at 22424, ¶ 32. Note that the Commission argues that the FCC decided *not* to preempt based on the language, "we would preempt." *See* Report, 27. However, this sentence does not mean that state regulation is not preempted, but rather is referring to the "extent" of that preemption (an extent comparable to what is in the order). Moreover, when read in the context of the "would . . . preclude" at the beginning of the paragraph, it appears that it is the practical inseverability of VoIP itself that causes the preclusion, rather than the need for a new FCC order. *But see Minn. Pub. Utils Comm'n v. FCC,* 483 F.3d 570, 582-83 (8th Cir. 2007) (finding differently). However, the case *Minnesota* cited regarding a 'general prediction' is different from the *FCC Vonage Order*, in that rather than a general prediction ("'unlikely' to be found consistent with the Act"), "we would preempt" is a definitive statement. *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 594 (D.C. Cir. 2004).

[28] *See FCC Vonage Preemption Order*, 19 F.C.C.R. at 22424, ¶ 32.

[29] *Minn. Pub. Utils Comm'n v. FCC,* 483 F.3d at 579 (8th Cir. 2007).

policy" is consistent with the U.S. Supreme Court's decision in *Louisiana Pub. Serv. Comm'n v. FCC. Louisiana* stated that preemption is permissible when an obstacle to the accomplishment and execution of the full objectives of Congress or when there is outright . . . conflict between federal and state law.[30] The Report concludes that the statutory authority in Sections 230(b) and 706 is sufficiently similar to Section 151, the statute at issue in *Louisiana*, that 152(b) bars federal preemption of 230(b) and 706, as well.[31] But Section 230(b), drafted later in time, is unlike 151 in that federal policy regarding state regulation is much clearer. For example, 152(b) and 230(b) cannot be as easily guided to not conflict, because of the express statutory policy of preserving "a free market . . . for interactive computer services, *unfettered by state . . . regulation* . . ."[32] the same way as *Louisiana* read 152b with 151.[33] 230(b) by its terms is opposed to state regulation.[34] Thus, the FCC's policy and economic effects arguments are much stronger than those presented in *Louisiana*.

Second, the FCC has concluded that because VoIPs "demand cohesive national treatment[, state regulation] is offensive to the Commerce Clause,"[35] an argument not present in *Louisiana*. Third, the 8th Circuit upheld the FCC's conclusion that Minnesota PUC regulation of VoIP conflicts with federal policy, a conclusion "entitled to "weight," and . . . not arbitrarily or capricious," as the Report acknowledges.[36] Further, the FCC has a "thorough understanding of its own [regulatory framework] and its objectives and is uniquely qualified to comprehend the likely

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[30] *Id.* at 368-69.

[31] Report, 23-24.

[32] 47 U.S.C. 230(b) (emphasis added). Note that § 151 does not mention state regulation at all.

[33] *Louisiana*, 476 U.S. at 370 ("[S]ections [151 and 152(b)] are naturally reconciled to define a national goal of the creation of a rapid and efficient phone service, and to enact a *dual* regulatory system to achieve that goal.) (emphasis in original).

[34] 47 U.S.C. 230(b).

[35] *FCC Vonage Preemption Order*, 19 F.C.C.R. at 22430, ¶ 41 (citing *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 169 & *American Civil Liberties Union v. Johnson*, 194 F.3d at 1162 ("As we observed . . . certain types of commerce have been recognized as requiring national regulation. . . . The Internet is surely such a medium.").

[36] Report, 26.

impact of state requirements."[37] Accordingly, until the FCC rules otherwise, fixed, interconnected VoIP services are subject to the exclusive jurisdiction of the FCC.

Moreover, the Report does not attempt to address the significant FCC public policy reasons why state regulation of VoIP should be preempted. "[S]tate regulation violates the Commerce Clause if the burdens imposed on interstate commerce would be "clearly excessive in relation to the putative local benefits."[38] The FCC has concluded that "local benefits of state economic regulation would be limited."[39] At the same time, "there is no question that innovative services like [VoIP] are having a profound and beneficial impact on American consumers,"[40] while state regulation would likely increase the cost of the service. Furthermore, potential state regulation like limiting market entry, certification requirements, and taxation, would hamper competition, cause "delay in time-to-market and ability to respond to changing consumer demands", with no clear benefit for consumers.[41] Additionally, state regulation risks "eliminating or hampering this innovative advanced service that facilitates additional consumer choice, spurs technological development and growth of broadband infrastructure, and promotes continued development and use of the Internet."[42] Requiring VoIP providers to conform their service to meet the varying requirement of potentially 50 state commissions, "would greatly diminish the advantages of the Internet's ubiquitous and open nature that inspire the offering of services such as [VoIP] in the first instance."[43] All this discourages Congress's national policy of

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[37] *Minnesota*, 483 F.3d 570, at 580 (8th Cir. 2007) (citing *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000)).

[38] *FCC Vonage Preemption Order*, 19 F.C.C.R. at 22428, ¶ 38 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

[39] *Id.* at 22429, ¶ 40.

[40] *Id.* at 22431, ¶ 43.

[41] *See id.* at 22416, ¶ 20.

[42] *Id.* at 22427, ¶ 37.

[43] *Id.* at 22422, ¶ 29.

"encouraging and promoting the development of innovative, competitive advanced service offerings."[44]

III. THE COMMISSION SHOULD POSTPONE ISSUING A FINAL DECISION

The FCC has before it three proceedings – all of which began following the close of the briefing period in this docket -- which could definitively classify VoIP as an information or telecommunications service, or may provide further guidance on the breadth of the *FCC Vonage Preemption Order*. The Commission should not use its limited time and resources to issue a final decision that is likely to be challenged on appeal or that may become superfluous following the FCC rulings. Accordingly, the Commission should not issue a decision in this docket until the FCC has completed these proceedings.

In one proceeding, the FCC is considering a request from public service commissions in Nebraska and Kansas for a ruling that state universal service funds may assess nomadic VoIP interstate revenues, seeking clarification on the scope of the *FCC Vonage Preemption Order*.[45] While nomadic VoIP is arguably not at issue in this docket, the VON Coalition and others have asked the FCC to confirm in the proceeding the breadth of the *FCC Vonage Preemption Order* over VoIP generally, noting, as parties have stated in this docket, the choice to provide a nomadic or fixed VoIP service is a business decision of the service provider and not a technical limitation.[46] The comment cycle in this docket has closed and the matter is now ripe for a decision by the FCC.

In a second proceeding, Global NAPS has requested a declaratory ruling from the FCC that federal law prohibits state public utility commissions from subjecting VoIP to intrastate

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[44] *Id.* at 22421, ¶ 25.

[45] See, Nebraska Public Service Commission and Kansas Corporation Commission Petition for Declaratory Ruling or, in the Alternative, Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP intrastate Revenues, WC Docket No. 06-122 (filed July 16, 2009).

[46] Comments of the Voice on the Net Coalition, WC Docket 06-122, filed September 9, 2009, at 2, 7.

access tariffs.[47] In this case there is no distinction between nomadic and fixed VoIP, and a decision that VoIP is inherently interstate would clearly conflict with the Examiner's Report. The comment cycle in this docket also has closed and the matter is ripe for a final decision.

Finally, the FCC as part of its efforts to determine the appropriate regulatory structure for broadband Internet access services, has initially stated that that services that ride over the top of broadband connections (such as VoIP) will not be subject to federal regulation. In a statement issued May 6, 2010, FCC Chairman Julius Genachowski explained his plans for limited regulation of the transmission component of Internet access but no regulation for Internet-based applications and services:

> *Second, the approach is narrow. It will treat only the transmission component of broadband access service as a telecommunications service while preserving the longstanding consensus that the FCC should not regulate the Internet, including web-based services and applications, e-commerce sites, and online content*[48].

The FCC will be considering this issue at its next Open Meeting on June 17, 2010, when it is expected to issue a Notice of Inquiry that will address the regulatory framework for the Internet and, based on these FCC pronouncements, may address the services and applications that run on the Internet.[49] How and whether the underlying transmission component for VoIP is regulated or

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[47] Petition for Declaratory Ruling and Alternative Petition for Preemption to the Pennsylvania, Maryland and New Hampshire State Commissions, WC Docket No. 10-60.

[48] The full statement can be found at http://www.broadband.gov/the-third-way-narrowly-tailored-broadband-framework-chairman-julius-genachowski.html. Austin Schlick, General Counsel of the FCC, reiterated the point "Providers of Internet content, applications, and services would remain unregulated under the first prong of the Commission's consensus framework, while providers of negotiated ("private") carriage services—on the Internet or elsewhere—are not telecommunications service providers subject to Title II." See, www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html.

[49] See, FCC ANNOUNCES TENTATIVE AGENDA FOR JUNE 17th OPEN MEETING, released May 27, 2010, and available at www.fcc.gov.

not regulated is likely to have implications for VoIP. Accordingly, action by the Commission in this docket should be delayed until these FCC proceedings have been completed.

CONCLUSION

For the foregoing reasons, VON respectfully requests that the Commission not adopt the Hearing Examiner's Report, or, in the alternative, not issue a final decision in this docket until the completion by the FCC of important policy proceedings that will confirm the proper role of both federal and state regulators with respect to interconnected VoIP.

Respectfully submitted,

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June 8, 2010